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No. 03-6821

In The Supreme Court Of The United States

DAVID L. NELSON, *Petitioner*,

v.

DONAL CAMPBELL, Commissioner,
Alabama Department of Corrections, *et al.*, *Respondents*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF OHIO AND 29 OTHER STATES AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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United States ex rel. Silagy v. Peters,
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Other Authorities **Page**

Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*,
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Retrospective Forum: The Robert Alton Harris Execution: Public Policy Lessons from the Robert Alton Harris Case, 40 U.C.L.A. L. Rev. 295
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Symposium: Starting from Scratch: Rethinking Federal Habeas Review of Death Penalty Cases, 20 Fla. St. U.L. Rev. 133
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QUESTION PRESENTED

Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced prisoner, who seeks to stay his execution in order to pursue a challenge to the procedure for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?

STATEMENT OF INTEREST OF AMICI CURIAE

The *practical* question presented in this case—whether a death-sentenced prisoner may obtain a stay of execution by filing a complaint under 28 U.S.C. § 1983, after his conviction and sentence have been upheld by the state and federal courts—is of vital importance to the States. It is difficult to imagine an interest of the State more compelling than the enforcement of its criminal judgments. "[T]he power of the State to pass laws means little if the State cannot enforce them." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). Moreover, this Court has long recognized the "greater threat" to the State's interests in finality posed by second or successive habeas corpus actions, which "are less likely to lead to discovery of unconstitutional punishments." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). "Only with an assurance of real finality can the State execute its moral judgment in a case[,] [o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out[,] [and] [t]o unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victim of crime alike." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (internal citations and quotations omitted).

Recognizing this compelling interest in finality, as well as the significant costs of habeas corpus review in general, Congress in 1996 enacted stringent restrictions on the filing of second or successive applications for habeas corpus relief. Congress acted with the specific purpose of eliminating unwarranted interference in the States' enforcement of capital sentences, and specifically intended to strengthen and extend this Court's protections of the States' interest in the finality of their criminal judgments. Many years previously, this Court held in *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973), that it "would wholly frustrate

explicit congressional intent" if prisoners attacking the fact or duration of their confinement could avoid having to exhaust their state remedies—a requisite to the specific remedy of habeas corpus—"by the simple expedient of putting a different label on their pleadings." A like concern looms large here. The States' interest in the finality of their judgments in capital cases, and Congress's efforts to protect those interests, will be wholly frustrated if a death-sentenced prisoner can avoid the restrictions on repeated habeas corpus actions and obtain a stay of execution simply by labeling his pleading a "§ 1983 complaint." Further, as a practical matter, an exception for "method of execution" claims would swallow the restrictions on second or successive petitions and result in a new "last round" of litigation for *all* death-sentenced prisoners.

The *amici* States all share an interest in ensuring that their capital sentencing schemes remain viable. As a practical matter, this must include appropriate limitations on the scope of eleventh-hour federal litigation in the face of an imminent execution. Accordingly, the *amici* States respectfully request that this Court recognize the States' strong interest in finality, and uphold the plain language of the statutory framework Congress created, and the intent reflected in that language, by affirming the judgment below.

SUMMARY OF ARGUMENT

A death-sentenced prisoner's complaint that challenges the State's execution procedures, and seeks an injunction, directly interferes with the State's execution of its judgment; it is just as close, if not closer, to the core of habeas corpus as a complaint by an imprisoned inmate who seeks speedier release from an otherwise lawfully adjudged sentence. Indeed, such a challenge is the very essence of a collateral attack, as it seeks to deprive the State's judgment of its normal force and effect. Thus, not surprisingly, federal

courts have routinely recognized that challenges to execution procedures fall squarely within the traditional scope of federal habeas corpus.

Nelson cannot alter this result by merely relabeling his challenge as a § 1983 claim. In enacting AEDPA, and its limitations on second or successive habeas petitions, Congress intended to modify and strengthen this Court's abuse of the writ doctrine. And, even pre-AEDPA, this Court had repeatedly recognized that this doctrine applied to second or successive requests for stays of execution, regardless of whether the requested stays are labeled as § 1983 complaints. Permitting a death-sentenced prisoner to avoid Congress's subsequently enacted restrictions and obtain a stay of execution would wholly frustrate Congressional intent.

Indeed, the policy reasons underlying the habeas corpus statutes require that complaints filed by prisoners like Nelson, who seek to enjoin their executions, should *always* be subject to the statutory provisions governing second or successive habeas corpus petitions. Nelson essentially argues that if the prisoner can show that he was precluded by circumstances beyond his control from presenting his claim in a previous habeas corpus petition, the Court should allow a complaint under § 1983, or judicially exempt him from the statutory restrictions on second or successive petitions. But such exceptions surely would swallow the rules, and would severely damage the States' interest in the finality of their judgments in capital cases. No matter how slim the possibility of obtaining a stay, death-sentenced prisoners will have every incentive to delay their challenges to the State's method of execution until the final days before their execution is set to occur. Faced with these last-minute claims, courts may well conclude that no matter how facially meritless the complaint appears, they cannot possibly dismiss the complaint in the short time afforded by the prisoner's

dilatory filing. Congress surely had this in mind when it enacted the second or successive petition rules.

Moreover, contrary to Nelson's arguments, application of the second or successive petition rules "across the board" will not result in any fundamental unfairness. Most, if not all, challenges to a State's method of execution will "ripen" long before there would be any need for a prisoner to seek a stay of execution in order to litigate his claim. Certainly here, Nelson's specific complaint—that he will be "tortured" by his executioners' attempt to access his veins—is hardly novel or unique. Nearly twenty years ago, death-row prisoners argued to the federal courts that the "dangers" of intravenous injection—including difficulties in achieving effective venous access due to physical abnormalities—required the Food and Drug Administration to exercise jurisdiction over the use of lethal injection to execute condemned prisoners. Alabama made lethal injection its sole method of execution over a year before Nelson brought suit seeking, at the last minute, to delay his execution. And, as Nelson himself admits, he has long been aware of his "seriously compromised" veins.

At bottom, Nelson's real claim is that he has an absolute right to a federal district court forum in which to present his constitutional claims, no matter how late in the process he makes them. This Court has long recognized, however, that no such requirement exists. State courts provide a perfectly adequate vehicle for vindicating constitutional rights, and Nelson has such avenues open to him here. Even were that not the case, he could still seek to press his concerns before the State officials overseeing his execution, or, if necessary, even through an original writ in this Court. There is simply no need, nor any good reason, for this Court to ignore both precedent and Congressional intent in order to provide a federal district court forum for Nelson's efforts to delay execution of his sentence. In fact, doing so

would severely undercut the States' strong interest in the finality of their criminal judgments, and the viability of their capital sentencing regimes.

The States, therefore, respectfully request this Court to affirm the Eleventh Circuit's decision below.

ARGUMENT

I. A Complaint Like Nelson's, Which Seeks A Stay Of Execution And Challenges Execution Procedures, Must Be Treated As A Petition For A Writ Of Habeas Corpus, Subject To The Statutory Restrictions On Second Or Successive Petitions.

This Court has held that where a state prisoner's claim of constitutional error meets the language of both § 1983 and the federal habeas corpus statutes, Congress intended habeas corpus to be the prisoner's exclusive remedy. *See Preiser v. Rodriguez*, 411 U.S. 475 (1973). Like a prisoner who challenges a sentence of imprisonment, a death-sentenced prisoner who seeks to stay his execution via a "§ 1983 complaint" should be subject to the rules of habeas corpus, as the prisoner seeks to directly interfere with the State's execution of his death sentence. Indeed, such a complaint is the very definition of a collateral attack in habeas corpus, *i.e.*, it seeks on constitutional grounds to deprive the State's judgment of its normal force and effect. Moreover, federal courts have routinely recognized that challenges to execution procedures fall squarely within the traditional scope of federal habeas corpus. And, in amending the habeas corpus statutes, Congress clearly intended to subject requests for stays of execution to the limitations for second or successive habeas petitions. Accordingly, this Court should hold that requests for a stay of execution after a prisoner's initial request for habeas corpus relief are subject to the limitations on second or successive petitions,

notwithstanding the prisoner's attempt to denominate the request a "§ 1983 complaint."

A. Where the immediate relief a prisoner seeks is a stay of execution, a complaint under § 1983 is the "functional equivalent" of a habeas petition.

As an initial matter, the federal district court should have summarily dismissed Nelson's complaint since the relief he requested—a stay of execution—cannot be granted pursuant to 42 U.S.C. § 1983. The Court's decision in *Preiser*, clearly establishes that even where a prisoner's claim falls within "the literal applicability of [§ 1983's] terms," the specific federal habeas corpus statute is the *exclusive* remedy where it "clearly applies." *Preiser*, 411 U.S. at 489. And, federal habeas corpus "clearly applies" to challenges directed toward overturning a prisoner's conviction or sentence. A claim seeking a stay of execution attempts to directly thwart the State's ability to carry out a prisoner's sentence as much as—if not more than—the type of claim at issue in *Preiser*, *i.e.*, a claim seeking earlier release. Thus, under *Preiser*, prisoners cannot use § 1983 to seek a stay of execution, whatever the basis for their claim. Rather habeas corpus, with its attendant limitations, is their exclusive remedy.

This Court has repeatedly recognized that certain prisoner claims may fall both within the language of § 1983 and the traditional scope of habeas. *See, e.g., Preiser* 411 U.S. at 489; *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Preiser*, for instance, the prisoners alleged that State officials had acted unconstitutionally in depriving the prisoners of good time credits. The claim seemed to meet both the literal terms of § 1983—which provides a remedy against unconstitutional conduct by those acting under color of State law—and traditional habeas—since it sought earlier release

from confinement. The Court, however, explicitly rejected the notion that in such situations both vehicles would be open to the prisoner. In limiting the prisoners to pursuing their claims in habeas, the Court noted, in language directly applicable here, that, "[i]t would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade [habeas requirements] by the simple expedient of putting a different label on their pleadings." *Preiser*, 411 U.S. at 489-90.

The Court reached this result despite the prisoners' argument that, because they were merely challenging the cancellation of credits towards their sentences awarded for good behavior, they were not directly seeking to overturn the underlying state court criminal judgments. According to the Court, this challenge to their sentence was "just as close to the core of habeas corpus" as a direct challenge to the conviction itself. *Id.* at 489.

Although *Preiser* concerned prisoners sentenced to imprisonment, its reasoning applies equally—perhaps even more strongly—to a death-sentenced prisoner who seeks to enjoin his execution. The death-sentenced prisoner, *by definition*, is collaterally attacking his sentence, as "he [seeks] to deprive [the state's judgment] of [its] normal force and effect in a proceeding that [has] an independent purpose other than to overturn the prior judgments." *Parke v. Raley*, 506 U.S. 20, 30 (1992). The injunctive relief requested by the death-sentenced prisoner certainly is *closer* to the "core" of habeas corpus than the earlier release sought by the imprisoned inmate, who presents at most an *indirect* challenge to his sentence. As the Fifth Circuit has noted, "a request for a stay of execution entails a potential federal interference with state penal interests that is equivalent to, if not greater than, the request for immediate release (or speedier release) from prison that was at issue in *Preiser*." *Martinez v. Texas Court of Criminal Appeals*, 292 F.3d 417,

423 (5th Cir. 2002). As such, as the Sixth Circuit has held, a "challenge to the manner of execution is a challenge seeking to interfere with the sentence itself, and thus, is properly construed as a petition for habeas corpus." *In re Sapp*, 118 F.3d 460, 462 (6th Cir. 1997).

In light of the clear implication of this Court's precedent, it is not at all surprising that several circuits have unequivocally held that "[f]ederal courts lack jurisdiction to stay executions under § 1983." *See Moody v. Rodriguez*, 164 F.3d 893 (5th Cir. 1999). *See also Faulder v. Johnson*, 178 F.3d 741 (5th Cir. 1999); *Sapp*, 118 F.3d at 463-64; *Williams v. Hopkins*, 130 F.3d 333, 336 (8th Cir. 1997); *Gilreath v. Ray*, 273 F.3d 932, 933 (11th Cir. 2001). In *Spivey v. Ray*, 279 F.3d 1301 (11th Cir. 2002), for instance, the Eleventh Circuit determined that the district court properly denied Spivey's motion for a stay of execution filed in connection with a claim purportedly brought under § 1983. *Id.* at 1302. Recognizing that Spivey's motion for a stay of execution was properly characterized as a habeas corpus claim, the Court held that "any other relief [he] sought is intertwined with and merely incidental to his effort to gain a stay of execution;" and, accordingly, "*his claim necessarily implies a challenge to the imposition of his sentence*, and thus must be deemed a habeas corpus claim seeking a stay of execution" rather than a § 1983 claim. *Id.* at 1302 n.1 (quoting *Gilreath*, 273 F.3d at 935) (emphasis added).

Echoing the Eleventh Circuit's rationale, the Fifth Circuit in *Faulder* noted that the "essence of Faulder's last-minute request for relief in the district court and this court is an attempt ultimately to obtain an injunction against the death sentence lawfully imposed upon him by the state of Texas." *Faulder*, 178 F.3d at 742. As such, Faulder was "asking the federal courts to interfere with the state's carrying out of the death penalty," which, the Fifth Circuit noted, is "tantamount to seeking 'a remedy available to effect

discharge from any confinement contrary to the Constitution or fundamental law.'" *Id.* (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973)). As noted above, however, this Court in *Preiser* held that for such challenges, the "*sole federal remedy is a writ of habeas corpus.*" *Preiser*, 411 U.S. at 500 (emphasis added). Accordingly, these circuits have correctly held that inmates' "exclusive, appropriate" avenue for seeking a stay of execution was "a writ of habeas corpus" rather than § 1983 (*Faulder*, 178 F.3d at 742); and, thus, the district courts in each of these cases should have "denied [the inmates'] motion for stay of execution" under § 1983. *Spivey*, 279 F.3d at 1304.

In seeking a stay of execution, Nelson is directly challenging the State's ability to carry out its sentence. He simply cannot use § 1983 to obtain such relief. Accordingly, the district court properly denied his request.

B. Challenges to execution procedures must be treated as habeas corpus claims, regardless of the label the prisoner puts on them.

Not long after this Court's decision in *Gregg v. Georgia*, 428 U.S. 153 (1976), one commentator predicted that "a wave of cases examining the legality of the traditional modes of execution cannot be far away." Martin R. Gardner, *Execution and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 Ohio St. L. J. 96, 97 (1978). The predicted wave indeed materialized, and the examinations were conducted in federal court via petitions for habeas corpus relief. *See, e.g., Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) (electrocution); *McCorquodale v. Balkcom*, 525 F. Supp. 408 (N.D. Ga. 1981) (electrocution); *Mitchell v. Hopper*, 538 F. Supp. 77 (S.D. Ga. 1982) (electrocution); *Gray v. Lucas*, 710 F.2d 1048 (5th Cir. 1983) (gas); *Sullivan v. Dugger*, 721 F.2d 719 (11th Cir. 1983) (electrocution); *Dix v. Newsome*, 584 F.

Supp. 1052 (N.D. Ga. 1984) (electrocution); *Woolls v. McCotter*, 798 F.2d 695 (5th Cir. 1986) (lethal injection); *Andrews v. Shulsen*, 802 F.2d 1256 (10th Cir. 1986) (firing squad); *United States ex rel. Silagy v. Peters*, 713 F. Supp. 1246 (C.D. Ill. 1989) (lethal injection); *Hill v. Lockhart*, 791 F. Supp. 1388 (E.D. Ark. 1992) (lethal injection); *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994) (hanging); *Ramseyer v. Blodgett*, 853 F. Supp. 1239 (W.D. Wash. 1994) (hanging); *Hunt v. Smith*, 856 F. Supp. 251 (D. Md. 1994) (gas); *Gerlaugh v. Lewis*, 898 F. Supp. 1388 (D. Ariz. 1995) (gas); *Gattis v. Snyder*, 46 F. Supp. 2d 344 (D. Del. 1999) (lethal injection); *Wallace v. Davis*, 2002 U.S. Dist. Lexis 22353 (S.D. Ind. 2002) (lethal injection).

In light of this litany of cases, there can be little doubt that Eighth Amendment challenges to execution procedures fall "squarely within [the] traditional scope of habeas corpus." *Preiser v. Rodriguez*, 411 U.S. at 487. And, as discussed below (see Sec. II.B.), the fact that Nelson has tried to "personalize" his claims by arguing that there are unique difficulties with the process as applied to him, does nothing to change this result.

C. Congress clearly intended that the restrictions on second or successive petitions should apply to requests for stays of execution, regardless of how they are denominated.

The AEDPA's restrictions on second or successive petitions address what this Court often has described as "abuse of the writ." The abuse of the writ doctrine is "a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions," designed "to vindicate the State's interest in the finality of its criminal judgments." *McCleskey v. Zant*, 499 U.S. 467, 489, 493 (1991). Under pre-AEDPA

precedents, the "equitable rationale" underlying the abuse of the writ doctrine—"avoiding, among other things, 'last-minute attempts to manipulate the judicial process'"—applied "to a suit challenging the method of execution, *regardless of the technical form of action.*" *Lonchar v. Thomas*, 517 U.S. 314, 329 (1996) (*citing Gomez v. United States Dist. Court for the Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992)) (emphasis added). In *Gomez*, the Court vacated a stay of the execution of Robert Alton Harris, who had presented an eleventh hour challenge to execution by lethal gas in a complaint under § 1983. In doing so, the Court described Harris' § 1983 action "as an obvious attempt to avoid the application of *McCleskey v. Zant*." 503 U.S. at 653. The same is true here.

"This Court has repeatedly noted the interplay between statutory language and judicially managed equitable considerations in the development of habeas corpus jurisprudence." *Schlup v. Delo*, 513 U.S. 298, 319, n. 35 (1995). Congress clearly intended to modify and strengthen this Court's "abuse of the writ doctrine," and to apply the newly enacted restrictions to *all* death-sentenced prisoners who seek stays of execution after completion of their initial round of habeas corpus litigation, regardless of whether the stays are requested under § 1983. To argue otherwise is to suggest that Congress was unaware of this Court's decision in *Gomez*, or that Congress was satisfied with the existing restrictions on abusive filings in capital cases. Both suggestions are demonstrably untenable. *See Symposium: Starting from Scratch: Rethinking Federal Habeas Review of Death Penalty Cases*, 20 Fla. St. U.L. Rev. 133 (Summer, 1992) (noting that cases like Harris' "have fueled the anti-habeas fire"); *Retrospective Forum: The Robert Alton Harris Execution: Public Policy Lessons from the Robert Alton Harris Case*, 40 U.C.L.A. L. Rev. 295, December, 1992 (arguing that *Harris* case demonstrated the need for Congressional reform); *Felker v. Turpin*, 518 U.S. 651, 664

(1996) ("The Act also codifies some of the pre-existing limits on successive petitions, and further restricts the availability of relief to habeas petitioners.").

In sum, it is clear that Congress intended the restrictions on second or successive petitions to apply to stays of execution requested under § 1983.

II. The Policy Reasons Underlying The Habeas Corpus Statute Strongly Counsel Against Recognizing Special Exceptions To Statutory Habeas Restrictions For Those Prisoners Seeking Stays Of Execution.

Nelson implicitly concedes the obvious—that challenges to the State's method of execution, for all practical intents and purposes, fit into the habeas corpus mold. However, he essentially argues that if the prisoner can show that he was precluded by circumstances beyond his control from presenting his claim in a previous habeas corpus petition, the Court should allow a complaint under § 1983, or judicially exempt the prisoner from the statutory restrictions on second or successive petitions. "The policy reasons underlying the habeas corpus statute," *Preiser*, 411 U.S. at 490, however, counsel decisively against such an override of Congress's clear intent, especially in the context of stay requests. If there is *any* way around the second petition restrictions on obtaining a stay of execution, every death-sentenced prisoner will seek it out. The States' interest in the finality of their judgments in capital cases will thereby be severely harmed.

Moreover, that harm is neither dictated by the interests of fundamental fairness nor necessary as a practical matter. Virtually all "method of execution" claims will be "ripe" at some point well in advance of the execution date. Nelson, for instance, has known for two decades about his

compromised veins, and for over a year that lethal injection was the sole means of execution. Whether or not, as a general matter, there should be an exception to second habeas rules for newly-arisen execution method claims that are presented well in advance of execution, there surely should be no such exception for prisoners seeking eleventh-hour stays, especially not where, as here, Nelson could have advanced his claim long before he did.

A. Recognizing the exception Nelson requests would severely undermine the States' important interest in the finality of their criminal judgments.

In the event that any exceptions to the second petition rules are recognized, the States have good reason to fear that all death-sentenced prisoners will assert eleventh-hour "method of execution" challenges in a last-minute attempt to delay their execution. As noted in Respondent's Brief, in the wake of this Court's grant of Nelson's certiorari petition, a number of death-sentenced prisoners presented "method of execution" claims in what were nominally denominated as § 1983 complaints. *See Robinson v. Crosby*, No. 03A653, 540 U.S. __ (Feb. 4, 2004); *Roe v. Taft*, No. 03A650, 540 U.S. ___ (Feb. 2, 2004); *Zimmerman v. Johnson*, No. 03A606, 540 U.S. __ (Jan. 21, 2004); *Bruce v. Dretke*, No. 03A554, 540 U.S. ___ (Jan. 14, 2004); *Williams v. Taft*, No. 03A590, 540 U.S. ___ (Jan. 13, 2004); *Ward v. Darks*, No. 03A584, 540 U.S. ___ (Jan. 13, 2004); *Beck v. Rowsey*, No. 03A576, 540 U.S. ___ (Jan. 8, 2004); *Zimmerman v. Johnson*, No. 03A497, 540 U.S. ___ (Dec. 15, 2003); *Cooper v. Rimmer*, No. 04-99001, 2004 U.S. App. Lexis 2071 (9th Cir. 2004). Quite obviously, the prisoners sought to liken their cases to Nelson's case, and it is fair to say that their eleventh-hour complaints were not necessitated by any unforeseen circumstances, but rather by this Court's grant of Nelson's petition and the stay of Nelson's execution.

Although these prisoners were not successful, should the Court ultimately accept Nelson's arguments that prisoners can escape second petition restrictions on seeking stays of execution merely by the expediency of claiming that their method of execution claims were previously "unripe" or "premature," it is reasonable to assume that virtually all future death-sentenced prisoners will be citing the "*Nelson* exception" as grounds for eleventh-hour stays. No matter how carefully the Court crafts these exceptions, death-row prisoners will argue that their requests for stays must be granted, because this Court has "held" that challenges to the method of execution are not "ripe" until the executions are imminent, just as Nelson cites *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), for the "holding" that claims "premature and unfit for adjudication until just before the execution is carried out" are not subject to the second petition rules. *See* Pet. Br. at 15. Of course, this Court announced no such general rule in *Stewart*. Rather, the Court noted specifically that *Stewart* did *not* present the situation where a prisoner raises a claim "for the first time in a petition after the federal courts have already rejected the prisoner's initial habeas application," and that, therefore, the Court had "no occasion to decide whether such a filing would be a 'second or successive habeas corpus application' within the meaning of AEDPA." 523 U.S. at 645. But that merely illustrates the point—those facing imminent execution have every incentive to aggressively characterize (or even mischaracterize) precedent in order to advance their claims.

In light of the practical realities of death penalty litigation, there is little question that the "ordinary principles governing stays" must "be revised to account for an attempt by a petitioner to manipulate the district court into granting relief where relief is clearly precluded." *Lonchar*, 517 U.S. at 336-37 (Rehnquist, C.J., concurring in the judgment). Congress clearly had this reality in mind when it required

petitioners to request permission to initiate second or successive rounds of habeas corpus litigation at the court of appeals level; required decision on the request by a three judge panel; and prohibited the panel's decision from being subject to petitions for rehearing or certiorari. *See* 28 U.S.C. § 2244(b)(3). Should this Court recognize exceptions to the second petition rules for "method of execution claims," the death-sentenced prisoner undoubtedly will argue that it is wholly appropriate to begin by asking the district court for a stay, and to insist on full and careful review should the district court deny the complaint on its "merits" and refuse to grant a stay. The district court and/or the court of appeals may feel compelled to grant the stay, concluding there is insufficient time to dismiss the case on the "merits," or the court of appeals may hesitate to vacate a stay issued by the district court.

The States do not suggest that every death-sentenced prisoner will succeed in maneuvering a stay in this way, should the Court recognize exceptions to the statutory second petition restrictions. However, the States believe in good faith that should this Court craft exceptions to the second petition rules, stays will be issued with sufficient frequency to encourage all death-sentenced prisoners to make the effort, even though all of the prisoners' complaints ultimately will be deemed without merit. Indeed, this Court recently vacated several stays issued by lower courts, stays apparently entered solely on the mistaken belief that the Court's grant of certiorari review in this case mandated them. The frequency of such unwarranted interferences with execution of the States' judgments, notwithstanding this Court's abuse of the writ doctrine, is what prompted the Congressional reforms in the first place. The end result of exceptions to Congress's clear intentions could be a new "last round" of federal litigation in capital cases that will seriously harm the States' interest in finality.

B. There is nothing new or unique about claims by death-sentenced prisoners that due to their physical condition or other unanticipated circumstances their executions could result in unacceptable pain.

Nelson's demand for an exception to normal habeas practice should be denied for another reason as well—the claim that he is asserting is neither unique, nor recently discovered. The potential difficulties of intravenous injection as a method of execution, including the problems obtaining effective venous access may pose, were raised by death-sentenced prisoners long before Nelson claimed that the method the State may potentially use here for obtaining access could result in an "unexpectedly torturous and needlessly painful" execution. *See* Pet. Br. at 17. Moreover, as Nelson admits in his own brief, he has been aware of his compromised veins, and the problems they present, for years. *Id.* at 5. And lethal injection had been the sole method of execution in Alabama for over a year before Nelson first brought his claim. Thus, there was no reason for him to stall until the final days before his scheduled execution in bringing his claim.

In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Court considered the claim of several death-row prisoners that the Food and Drug Administration was required to use its enforcement power to ensure that the States only use "safe and effective drugs" for their execution. The court of appeals ruled in the prisoner's favor. According to an amicus brief filed in their support, the prisoners claimed that "the technique of intravenous injection is fraught with dangers;" that it "is extremely difficult, if not impossible, to give lethal injections to persons with certain common physical conditions and abnormalities;" that "even people without abnormalities experience some constriction of the veins in

anticipation of intravenous injections;" and it "is expected that prisoners facing execution will manifest similar reactions, magnifying the difficulty of achieving effective venipuncture." *Heckler v. Chaney*, 1983 U.S. Briefs 1878 (September 29, 1984). *See also Woolls v. McCotter*, 798 F.2d 695, 697 (5th Cir. 1986) (rejecting claim that lethal injection was unconstitutional because FDA refused to determine whether lethal injection quickly and effectively causes a painless death). In short, concerns about effective venous access during lethal injection are hardly novel.

Nor can Nelson make his claim "unique" merely by asserting that obtaining access to *his* veins will present more difficulties or more potential for pain. Providing special exceptions to habeas requirements for prisoners who "personalize" their challenges to execution procedures would undoubtedly open the floodgates to a whole range of other claimed "physical abnormalities." For example, a prisoner may claim that the dosage level of the lethal chemicals is too high or too low for a person of his weight (and, of course, because weight fluctuates, the prisoner would claim the right to wait until execution is imminent to advance the claim); or that previous use of illegal drugs has increased his tolerances for the lethal chemicals; or that he has newly discovered that he is allergic to the chemical that is intended to render him unconscious. Further, as a conceptual matter, there is no reason that the exceptions Nelson proposes for handling "unanticipated" events should be limited to claims of physical abnormalities, such as the "bad veins" claim he presents here. A prisoner could claim that there is an unacceptable risk that the food consumed before the execution will reduce the effectiveness of the sedating drug; or that there are insufficient contingency plans in the event that the intravenous injection is interrupted by equipment failures.

In short, the factual and legal bases for claims like Nelson's are not so novel or unusual that the Court should ignore clear Congressional intent and create exceptions to the normal rules of habeas corpus for prisoners seeking to stay their executions. Doing so would create the potential for endless manipulation by death row inmates facing imminent execution.

That the Court should not struggle to manufacture an exception here is especially true in light of the record with regard to Nelson's "bad veins" claim. As Nelson himself admits, he has long been aware of his "severely compromised veins." *See* Pet. Br. at 5. In fact, by his own admission, he "has encountered repeated problems *over the last two decades* with prison medical personnel gaining venous access during routine physical examination." *Id.* (emphasis added). And he knew for over a year prior to advancing his claim that the State's intended method of execution would require venous access; Alabama made lethal injection the sole means of execution on July 1, 2002. His failure to advance a claim before now exposes his suit for what it is, a transparent attempt to forestall execution of Alabama's criminal judgment against him. There is no good reason for this Court to reward those efforts.

III. Prisoners Challenging Execution Procedures Have Sufficient Avenues, At Both The State And Federal Level, To Pursue Their Constitutional Claims.

At root, Nelson's claim is that the Constitution requires he have access to a *federal* forum in which to present his Eighth Amendment claim, (*see, e.g.*, Pet. Br. at 19-24), a right that he asserts "goes to the heart of due process." *Id.* at 21. That claim, however, fails for at least two reasons. First, this Court has long recognized that the state court system is a perfectly adequate vehicle for

vindicating federal constitutional claims, and here Nelson had viable avenues of such relief available in that forum. Second, even if a federal forum were necessary, Nelson had two: (a) he could have pursued an original writ in this Court; or (b) he could have sought certiorari review of the state court's disposition of his federal claim.

As this Court has noted, "state courts are just as able as federal courts to adjudicate [federal claims]." *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 826 (1990). *See also Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 507 (1962) ("nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law"). Indeed, in the habeas corpus context, the very context presented here, this Court has explicitly considered, *and rejected*, the notion that Nelson advances—that state prisoners must have access to a federal forum in which to press their federal constitutional claims. *See Stone v. Powell*, 428 U.S. 465 (1976). In *Stone*, the Court barred state prisoners from presenting Fourth Amendment claims on habeas, so long as they had had an opportunity to fully and fairly litigate that claim in state court. In language directly responsive to the Nelson's argument that he is entitled to a federal forum here, the Court stated:

> The policy arguments that [the state prisoners] marshal in support of the view that federal habeas corpus review is necessary to effectuate the Fourth Amendment stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights. The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule, and the oversight jurisdiction of this Court on certiorari is an inadequate

> safeguard. ... Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. ... In sum, there is "no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [federal law] than his neighbor in the state courthouse."

Stone, 438 U.S. at 493 n. 35, (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harvard Rev. 441, 509 (1963)). Just so here.

In essence, Nelson is attempting to resurrect the theory this Court expressly rejected in *Allen v. McCurry*, 449 U.S. 90 (1980), that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises." *Id.* at 103. It is just as true today, however, as it was when *Allen* was decided, that this theory finds no support "in either the Constitution" or "in §1983 itself." *Id.* at 103-04.

Indeed, if anything, changes in the law demonstrate lesser, not greater, entitlement to a federal forum. In particular, in enacting AEDPA, Congress *rejected* the argument that Nelson presses here, that a state prisoner must have a federal forum in which to present his federal claims.

Under AEDPA, a federal court can grant habeas relief *only where* the state court judgment violates clearly established federal law as determined by this Court's precedent. *See* 28 U.S.C. § 2244; *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Errors in federal law that do not rise to that level may not be heard in federal court. *Id.* at 412 (noting that "§ 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court"). That is, Congress explicitly and unequivocally foreclosed habeas review for certain types of federal law claims. In short, Nelson simply cannot maintain that "due process" requires that he have a federal forum in which "to present his Eighth Amendment claims of needless cruelty." Pet. Br. at 23.

And, as Respondent points out in its brief, Nelson had (and still has) ample opportunity to present his claim to Alabama's *State* courts. Resp. Br. at 45-48. Moreover, there is no reason to believe that similarly-situated prisoners in other States will find the doors to state court closed when they seek relief. The States offer a variety of state court mechanisms through which a prisoner could present the constitutional concerns that Nelson claims here.[1] Indeed,

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[1] Other States have similar regimes employing multiple ways by which inmates may have claims heard without regard to timeliness or successive petition bars. Three with regimes that are comparable to the one employed by the State of Alabama are those in Nebraska, Tennessee, and Washington. *See, e.g.*, Nebraska: NEB. REV. STAT. §§ 29-3001, ET SEQ. (2003) (state post-conviction remedy without a time bar allowing any claim that could not have been raised earlier), Neb. Rev. Stat. § 83-1,132 (2003) (granting an automatic stay of execution upon application for commutation of sentence), NEB. S. CT. R. 6.C(2); Tennessee: TENN. CODE ANN. § 4-5-223 to -225 (2003) (providing for declaratory judgment actions of state agency, e.g., the policies of the Tennessee Department of Corrections's policies for administering lethal injection), TENN. S. CT. R. 12.4 (setting forth detailed procedures for the setting and objection to execution dates in the Supreme Court of Tennessee); Washington: WASH. REV. CODE § 10.73.100 (2003) (exempting claims that depend on newly discovered evidence from the one-year statute of limitations for personal restraint petitions), WASH. REV. CODE § 10.73.140 (2003) (exempting new claims filed in successive petitions provided

States must have such avenues available, as challenges to the methods of execution have been frequently raised and reviewed in federal habeas corpus. *See* Section I.B. above (citing cases). Presumably, the prisoners in those cases were able to exhaust their claims before the state courts. In light of these available state court options, Nelson's claim that due process requires a federal forum must fail.

Moreover, even if state courts were not available, state executive officials provide yet another check against unconstitutional conduct during the course of the execution. This Court should not assume that the state officials would merely ignore constitutional guarantees. As this Court noted in *Alden v. Maine*, 527 U.S. 706, 755 (1999):

> The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the Unites States. The good faith of the States thus provides an important assurance that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land."

Here, however, entry of a stay would require just the type of assumption this Court cautioned against in *Alden*. Prison officials, as well as Alabama's Governor, are well aware of the constitutional prohibitions against cruel and unusual punishment. Should it appear that the procedure is becoming

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"that [the inmate] has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition"), WASH. R. APP. P. 16.2 -.27 (detailing procedural safeguards entitled to inmates pursuing a personal restraint petition).

"intolerably painful and dangerous" as Nelson alleges (*see* Pet. Br. at 10), state officials will have ample opportunity to stop the process and address any problems. Indeed, state officials are already demonstrating their respect for the constitutional concerns Nelson raises here—they have repeatedly indicated that they will use the least invasive and painful method that they can to obtain venous access, that they will use a "cut down" only if absolutely necessary, and that, should it prove necessary, every effort will be made to ensure Nelson's comfort during the procedure. Their "good faith" adherence to the Constitution in executing their duties provides yet additional protection against constitutional violations during the execution process.

Finally, even if the Constitution did mandate a federal forum for vindicating federal claims, and it does not, two such avenues are available here. First, Nelson could seek certiorari review of the state court disposition of his federal claims, thus exposing the state court decision to the "oversight jurisdiction" of this Court. *See Stone*, 428 U.S. at 493, n. 35. This "oversight jurisdiction" ensures that the Court will have the opportunity to police the appropriate scope of any impacted constitutional guarantees. Second, as the Court recognized in *Felker v. Turpin*, a prisoner may petition this Court for an original writ of habeas corpus. 518 U.S. at 664. In sum, Nelson is not without available avenues of relief, both State and federal. Accordingly, there is no need, nor any reason, for this Court to upset settled precedent in order to allow Nelson's claim to proceed in federal d strict court.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Eleventh Circuit.

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